SUPREME COURT U. S.

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Supreme Court of the United States

OCTOBER TERM, 1966

No. 456

BEYS AFROYIM,

Petitioner,

—v.—

DEAN RUSK, as Secretary of State,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BEYS AFROYIM,

Petitioner,

—v.—

DEAN RUSK, as Secretary of State,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on May 24, 1966.

Citations to Opinions Below

The opinion of the District Court for the Southern District of New York is reported at 250 F. Supp. 686 (reproduced *infra,* Appendix p. 10a). The opinion of the Court of Appeals is reported at 361 F. 2d 102 (reproduced *infra* p. 3a).

Jurisdiction

The judgment of the Court of Appeals was entered on May 24, 1966 (*infra* p. 1a). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Questions Presented for Review

Whether the Federal statute depriving an American citizen of his citizenship on the basis that he has voted in a foreign political election, is invalid under the United States Constitution. Whether the statute violates the guarantee of free expression of the First Amendment; the due process guarantee of the Fifth Amendment; the safeguards of the Fifth, Sixth and Eighth Amendments with respect to the imposition of punishment; and the guarantee of citizenship of the Fourteenth Amendment.

Statute Involved

Section 401 of the Nationality Act of 1940, 54 Stat. 1137, as amended by the Act of September 27, 1944, 58 Stat. 746, 8 U. S. C. (1946 ed.) §801, provided:

> "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by: • • •
>
> (e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory."

This provision is now in force by its reenactment in section 349(a)(5) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 267-268, 8 U. S. C. §1481(a)(5).

Statement

Petitioner's complaint sought a declaratory judgment that Section 401(e) of the Nationality Act of 1940, on its face and as applied to him, is unconstitutional and that he therefore retains his United States citizenship. The District Court judgment, affirmed by the Court of Appeals, granted defendant-respondent's motion for summary judgment and denied plaintiff-petitioner's.

Jurisdiction of the District Court

The District Court had jurisdiction to determine the complaint, whether or not petitioner was in the United States at the time of its filing.[1]

Facts

The facts are undisputed, and appear in the complaint, a stipulation of the parties, and an exhibit submitted by respondent at the District Court hearing.

Petitioner was born in Poland in 1893, emigrated to the United States in 1912, and became an American citizen by naturalization in 1925. In 1950, pursuing his profession as an artist, he went to Israel. In preparation for his return to the United States, to reside here and continue his

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[1] See Section 360(a) of the Immigration and Nationality Act of 1952, 8 U. S. C. §1503(a), as to suits by persons within the United States; the complaint alleged petitioner's residence in the United States. See Section 10 of the Administrative Procedure Act (5 U. S. C. §1009), the Declaratory Judgment Act (28 U. S. C. §2201), and *Rusk* v. *Cort*, 369 U. S. 367 as to suits by non-residents. Here as in *Rusk*, there had been a final administrative determination by respondent Secretary of State that petitioner had lost his citizenship.

profession, he applied in 1960 to a United States Vice-Consul in Israel for the renewal of his American passport. His application was rejected on the ground that he had cast a ballot in an election in 1951 for the Israeli Knesset, the legislative body of Israel, and that he had thereby lost his American nationality pursuant to section 401(e) of the Nationality Act of 1940. The Vice-Consul's action was affirmed by the State Department's Board of Review on the Loss of Nationality.

According to the stipulation, petitioner voluntarily voted in such election, and it constituted a political election in a foreign state within the meaning of section 401(e). Petitioner asserted in the complaint and stipulation that neither at the time of the election nor at any other time did he intend or desire to lose or abandon his American citizenship and that he considered himself at all times an American citizen with allegiance to the United States. Respondent did not stipulate as to these assertions, maintaining that they are irrelevant.

Respondent's determination that petitioner had voted in the Knesset election in 1951, was based in large part on a stamp placed in his Israeli identification booklet by an Israeli official at the polling-place at the time of such election. The booklet, exhibited by petitioner to the official, specified that petitioner was exclusively an American citizen (see Certified File of Dept. of State, filed as part of Court of Appeals' record, p. 11).

Reasons for Granting Writ

This Court's decision in *Perez v. Brownell*[2] upholding Section 401(e), is inconsistent with the criterion of constitutionality developed since its rendition, and with this Court's standard as to First Amendment rights, which was not there in question. Considered under these criteria, the Section is unconstitutional. Review of its constitutionality is further warranted because significant aspects of its legislative history seem to have been overlooked in the *Perez* decision.

I—Pertinent Criteria of Constitutionality

A. As the concurring judge in the Court of Appeals pointed out (*infra* p. 8a), there is "grave doubt" as to the vitality of *Perez,* in view of the opinions rendered by this Court and by individual Justices since that decision.

The five-judge majority in *Perez* upheld the statute on the ground that Congress, acting under its power "to regulate foreign affairs," "may have concluded not unreasonably that there is a relevant connection between the fundamental source of power" and abrogation of the citizenship of any American citizen who votes in any foreign political election (356 U. S. at p. 58). Because of this rationale, the majority found it unnecessary to determine whether voting by an American citizen in a foreign election could reasonably be deemed to import a withdrawal of his allegiance to the United States; the opinion adverted only obliquely to this possibility.[3]

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[2] 356 U. S. 44.

[3] *Perez* suggests that Congress may have interpreted such a vote as to some extent indicative of a change in allegiance (356 U. S. at pp. 60-61), apparently inferring this Congressional view from

The dissenting opinions in *Perez* had, on the other hand, emphasized that the citizenship ordained by the Fourteenth Amendment can be abrogated by the Government only if the citizen voluntarily relinquishes it or his conduct manifests a change of allegiance (356 U. S. at pp. 68-69, 75-78, 80, 84). It is the dissenting view that has now become accepted. See *Schneider* v. *Rusk*, 377 U. S. 163, at p. 169 and dissent at pp. 175-176.[4] Save for *Perez*, all of this Court's opinions validating or discussing expatriation, are consistent with this present emphasis.

We shall show below (Point II) that a vote in a foreign political election, per se, has never been treated as indicating a change of allegiance, that it cannot reasonably be so regarded, and that section 401(e) embodied a punitive purpose rather than a judgment on a basic connection between voting and allegiance.

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a report by a committee in the Executive Branch (quoted at 356 U. S. p. 54). In fact, however, the legislative history (*infra*, p. 8), shows that this report was not significant in the enactment of section 401(e).

[4] See also *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144 at p. 187 (concurring opinion by Mr. Justice Brennan) and p. 214 (dissenting opinion by Mr. Justice Stewart).

For appraisals of the vitality of *Perez*, see *Tanaka* v. *Immigration & Naturalization Service*, 346 F. 2d 438, 442, n. 3 (C. A. 2, 1965) (dissent); Agata, *Involuntary Expatriation and Schneider* v. *Rusk*, 27 U. Pitt. L. Rev. (1965) 1, 36-47; Kurland, *The Supreme Court-Foreword*, 78 Harv. L. Rev. (1964) 143, 175.

[5] See discussion of cases preceding *Perez*: 356 U. S. at pp. 67-73 (dissent); see also *Perkins* v. *Elg*, 307 U. S. 325, 334: "Expatriation is the voluntary renunciation or abandonment of nationality and allegiance"; *Carlisle* v. *U. S.*, 83 U. S. (16 Wall.) 147, 154; Comment, 56 Mich. Law Rev. (1958) 1142, 1148-1151, respecting similar views expressed in Congressional debate in 1818.

The same principle prevails in international law; see 3 Moore, *Digest of International Law* 306: "(T)he transfer of allegiance must be by a distinctly voluntary act . . . this (is) believed to be the generally recognized rule of international law. . . ."

B. The *Perez* holding, accepting the abrogation of citizenship whenever a "rational nexus" between it and the Government's power over foreign affairs can be posited as possible, represents a unique divergence from Constitutional precepts. This Court has increasingly emphasized that measures affecting basic democratic rights are valid only if narrowly drawn to meet real and substantial public needs. See *Aptheker* v. *Secretary of State,* 378 U. S. 500, 508-509, and cases there cited; *Carrington* v. *Rash,* 380 U. S. 89, 94; *Harman* v. *Forssenius,* 380 U. S. 528, 542.

Surely this criterion is applicable to the right of citizenship, a right explicitly granted in the Constitution and basic to the enjoyment of all other rights,—its abrogation being potentially tantamount to banishment.[6] Compare *United States* v. *Wong Kim Ark,* 169 U. S. 649, 694, declaring that governmental needs could not justify limitation of the right to citizenship guaranteed by the Fourteenth Amendment. In any event, a stringent standard of constitutionality must be applied to section 401(e) because the power over citizenship was here used to curtail the First Amendment right of expression—a right which was not in question in *Perez* (see *Trop* v. *Dulles,* 356 U. S. 86, 106, n. 2. See *infra* p. 15 for First Amendment discussion).

In view of the inconsistency of *Perez* with the pertinent criteria of constitutionality, this Court should grant this petition.

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[6] See *Perez,* 356 U. S. at pp. 64-65, Warren, *C. J.* dissenting. The essential benefit of citizenship is the citizen's right to reside in or return to the territory of his State. I Oppenheim, *International Law* (Lauterpacht, 8th ed., 1958) 646; Borchard, *Diplomatic Protection of Citizens Abroad* (1916) 25; *Worthy* v. *United States,* 328 F. 2d 386, 394 (C. A. 5, 1964).

II—Appraisal of Statute Under the Relevant Criteria

A. Applying the standard evolved by this Court that only acts manifesting a change of allegiance can justify involuntary denationalization, it is clear that section 401(e) is invalid.

1. The history of this provision gives no indication that voting in a foreign political election, without more, can reasonably be taken to manifest a change of allegiance. The only precedent and the direct progenitor for section 401(e) was a bill introduced in 1935 by Representative Dickstein, then chairman of the House Committee on Immigration and Naturalization. It was occasioned by allegations that American citizens of German birth voted in favor of Germany, and thus Nazism, as against France in the plebiscite of January 13, 1935 to determine sovereignty of the Saar.[7] The "Dickstein bill to forfeit the citizenship of American nationals" voting in the plebiscite, was introduced shortly after it.[8]

The House Committee report on the bill when it was reported out, stated that it had been introduced because

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[7] German natives, resident in the United States, returned to the Saar to vote in the plebiscite; whether they were naturalized American citizens or aliens, however, was not disclosed. New York Times for January 6, 1935, p. 20, col. 2. (See *infra* as to reactions to the plebiscite, which negate the *Perez* supposition that voting abroad by Americans might cause embarrassment in our foreign relations.)

[8] New York Times for January 17, 1935, p. 16, col. 2. See 79 Cong. Rec. 2050 (Record for February 15, 1935).

Prior to the plebiscite Rep. Dickstein announced that he would propose a bill "to deprive of citizenship all persons returning from this country to the Saar district to take part in the vote" and that, if the bill was not enacted before their return to this country, he would seek other means to deport them. (New York Times for January 4, 1935, p. 12, col. 3.)

"there is now no law on our statute books which would permit any action leading to cancellation of (the) . . . United States citizenship" of Americans who voted in the plebiscite.[9] The committee was unconcerned with foreign elections generally but with "elections or plebiscites to determine sovereignty over foreign territory." However, it conceived of the bill as a general penalty provision, the report stating:

> "The purpose of the bill is to enact new legislation which will provide the penalty of loss of citizenship and nationality . . . (it is) legislation to serve lawful notice that hereafter citizenship here does not carry with it any loophole through which voting in foreign states may be done without penalty to the citizen so exercising foreign suffrage." [10]

The bill apparently was dropped after it was opposed on the floor of the House on the ground that:

> "If you are going to confer citizenship by judicial process, then the proper thing to do is to divest them of that citizenship by a similar procedure. This bill makes no provision for proof, no provision for giving a man his day in court" (79 Cong. Rec. 2907).

With the approval and at the request of the House Committee on Immigration and Naturalization—chaired by Representative Dickstein during this entire period—a committee was appointed by the President in the Executive Branch to draft a codification of the nationality laws (see 86 Cong.

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[9] House of Representatives Report No. 216, 74th Cong., 1st Sess., on H. R. 5799 (1935) p. 1.

[10] *Ibid.*, at pp. 2-3.

Rec. 11943).. The recommended codification, completed by the President's committee in 1938 and enacted as the Nationality Act of 1940, included the Dickstein proposal as section 401(e). This section was in no sense a codification. The comparison tables show that the only previously existing laws even considered relevant to it were those expatriating American citizens who were naturalized by, or took an oath of allegiance to, a foreign state. See tables, 86 Cong. Rec. 81. However, the Congressional reports and the statements on the floor of Congress by Chairman Dickstein and others, emphasized the codifying function of the bill that became the 1940 Act,[11] and failed to explain—or even mention—the novelty of section 401(e).[12]

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[11] See House Report 2396, 76th Cong. 3rd Sess., p. 1: the bill was a "consolidation and restatement"; to the same effect, 86 Cong. Rec. 11942, 11949; Senate Report 2150, 76th Cong. 3rd Sess., printed at 86 Cong. Rec. 12430; Flournoy, *Nationality Act of 1940* (Contemporary Law Pamphlets, New York Univ. Law School, 1941) p. 5. (Mr. Flournoy was Assistant Legal Adviser to the State Department.)

The enactment clause of the 1940 Act stated: "That the nationality laws of the United States are revised and codified as follows" (54 Stat. 1137).

[12] See 86 Cong. Rec. 11939-11965, 13244-13250.

The report of the President's committee had included the general statements quoted in the *Perez* opinion (356 U. S. at p. 54), without however any supporting analysis or explanation. See Codification of the Nationality Laws of the United States (report by President's Committee, H. R. Print) 76th Cong., 1st Sess., p. 67.

The hearings on the bill, held only in the House, were entitled: "To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code" (Hearings before House Committee on Immigration and Naturalization on H. R. 6127, January-June 1940). There is only brief mention of Section 401(e) in the hearings, Mr. Flournoy stating that the section would be mainly applicable to dual citizens and Representative Dickstein explaining it as applicable to the "Nazis" voting in the Saar plebiscite (pp. 132, 287).

2. Thus, section 401(e) was not a reflection of a considered judgement that a vote in any foreign election manifests a change in allegiance. Not only was there no support for this view but precedent authorities and practice negated it.

American courts had held that American citizens were not expatriated by the "exercise of political rights (abroad) such as voting, under circumstances not indicating any intention to renounce the original allegiance." Borchard, *Diplomatic Protection of Citizens Abroad* (1916) 712 and cases there cited. This conclusion was a corollary of the view that the right to vote in the United States and United States citizenship are not inherently coextensive, though government can control the franchise to make them so. Aliens were for many years and until quite recently permitted to vote here (356 U. S. at pp. 77, 84-85); and on the other hand a person's United States citizenship did not per se entitle him to vote. See *Minor* v. *Happersett,* 88 U. S. (2 Wall.) 162, 170, holding that women, though citizens, were not for that reason entitled to vote.

To infer a citizen's change of allegiance from his casting a vote in a foreign country, is not only contrary to American tradition, but the 401(e) rule is unique in nationality laws throughout the world.[13] Nor is there any corollary

[13] The compendium prepared in 1929 as background for a proposed international codification, shows no law providing for denationalization on the basis of a vote in a foreign election. *Research in International Law, Draft Convention on Nationality* (Harvard Law School, 1929) pp. 100-106. The only country listed in a recent compilation as having such a provision is the United States. *National Legislation Concerning Grounds for Deprivation of Nationality* (Report of United Nations General Assembly, International Law Commission, 5th Sess., 1953) p. 6. And see 356 U. S. at p. 77, n. 39.

principle here or elsewhere that voting in a country's election confers its citizenship.[14]

3. Finally, the inference required to justify section 401(e) is negated by the concept that allegiance is a relationship of depth and permanence[15] and that an individual's "absolute and permanent allegiance to his government or sovereign" is to be distinguished from the "local and temporary allegiance" of an alien to the government of a country in which he resides (*Carlisle* v. *United States*, 83 U. S. (16 Wall.) 147, 154). In view of an alien's temporary allegiance to the government of his place of residence and his subjection to its laws according to basic international principles,[16] an American citizen's interest and participation in the affairs of his habitat abroad to the extent of voting in an election there, is not an unnatural concomitant of his residence.[17] His voting therefore cannot be

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[14] Thus, section 401(e) is contrary to a basic tenet as to citizenship and change of allegiance: "the principle of *continuity*, by which the nationality of origin is retained until a new one is acquired." Borchard, op. cit. *supra*, at p. 19. See also Preuss, *International Law and Deprivation of Nationality*, 23 Georgetown Law Journ. (1934) 250, 255; 356 U. S. at p. 80 (Douglas, *J.*, dissenting in *Perez*).

[15] See *United States* v. *Wong Kim Ark*, 169 U. S. 649, 655-656; Weis, *Nationality and Statelessness in International Law* (1956) 32-35.

[16] See *Wong Kim Ark*, 169 U. S. at pp. 693-694; Borchard, op. cit. *supra* at p. 11.

[17] It may be noted that Section 401(e) applies even to a municipal election [*Bisceglia* v. *Acheson*, 196 F. 2d 865 (C. A. D. C., 1952); see also *Miranda* v. *Clark*, 180 F. 2d 257 (C. A. 9, 1950): "local primary election for city mayor"], and to a vote cast for the purpose of combatting Communism and promoting democracy [see *Acheson* v. *Wohlmuth*, 196 F. 2d 866, C. A. D. C., 1952 (cert. den. 344 U. S. 833); *Acheson* v. *Kuniyuki*, 189 F. 2d 741, reh. den. 190 F. 2d 897 (C. A. 9, 1951) cert. den. 342 U. S. 942].

deemed per se to manifest a withdrawal or transfer of his fundamental allegiance to the United States.

The abrogation of petitioner's American citizenship was based on his voting abroad per se; his voting was unaccompanied by any indication of a change of allegiance. Petitioner voted in the Israeli election openly and avowedly as an American citizen, Israeli law permitting him to do so; and he acquired no other citizenship or status by his participation in the election.

Section 401(e) is equally objectionable as applied to a dual citizen of the United States and of a foreign country, who votes in that country as its citizen. For dual citizenship, recognized and accepted in our law, as it is internationally,[18] "could not exist if the assertion of rights or the assumption of liabilities of one were deemed inconsistent with the maintenance of the other" (*Kawakita* v. *United States*, 343 U. S. 717, 725). If the 401(e) rule was applied by other countries as well as the United States, the dual citizen would be unable to vote anywhere and retain his dual citizenship.

B. Section 401(e) must fall not only because it imposes denationalization absent an act manifesting a change in allegiance, but also because the measure is not narrowly drawn to meet a clear and compelling governmental need.

The justification primarily emphasized in *Perez* for the statute was that the people or government of the foreign country where the American citizen votes, may regard his act of voting as the action of the United States government and that it is therefore "pregnant with the possibility of embroiling this country in disputes with other nations"

[18] I Oppenheim, op. cit. *supra*, at pp. 664-666.

(356 U. S. at pp. 59, 60). The history of the event that stimulated the legislation—the Saar plebiscite—wholly negates the *Perez* hypothesis that American citizen voters may seem to represent this Government's views and embarrass its conduct of foreign affairs.[19] Nor would this inference as to representation be drawn by any foreign government acquainted with diplomatic or democratic usage.[20]

Thus, while problems in connection with our foreign affairs may have engendered the early expatriation legislation codified in the 1940 Act (as stated in *Perez*, 356 U. S. at pp. 48, 56-58), section 401(e)—which was not a codification—cannot be so explained or justified.

Further, as noted by the concurring judge in the Court below (*infra* p. 9a), in a case like petitioner's where the voter's American citizenship is open and avowed and the foreign government authorizes aliens to vote, any possibility of embroilment or embarrassment between the United

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[19] In the reports on the plebiscite there was no hint whatsoever that the 800-odd votes cast by "North American residents" were deemed to represent the views of the United States government. See New York Times for January 16, 1935, p. 12, cols. 3-8; p. 13, cols. 1-6. And our Government apparently experienced no embarrassment or concern in relation to Germany, France, or any other country over any votes that might have been cast by American citizens. Rather, "Satisfaction over the settlement of the Saar problem was expressed . . . by the State Department" (based on the clarity of the choice of the Saarlanders). New York Times for January 16, 1935, p. 12, col. 3; for a similar reaction by the British government, see p. 13, col. 4.

[20] The only reference cited in *Perez* in support of the inference is "Cf. Preuss, International Responsibility for Hostile Propaganda Against Foreign States, 28 Am. J. Int'l L. 649, 650" (356 U. S. at p. 59). The cited page quotes the American rejection in 1885 of a protest by Spain respecting propaganda in the United States against the Spanish government in Cuba.

States government and the foreign government, is removed (to the same effect, see Justice Whittaker's dissent in *Perez*, 356 U. S. at p. 85).[21]

Even if there were support for a fear of possible embarrassment in international relations as a result of Americans voting in foreign elections, section 401(e) would be unjustified. Under the principles developed by this Court, such a speculative and manageable danger does not permit the Government to abrogate a right as fundamental as the right to retain American citizenship, or to deter exercise of the First Amendment right of political expression. Certainly the fact that opinion is expressed in canalized form through casting of a ballot, does not lessen First Amendment protection.

The other ground proposed in *Perez* as justification for section 401(e) is that "The citizen may by his action unwittingly promote or encourage a course of conduct contrary to the interests of his own government" (356 U. S. at p. 59). If this means, as it seems to, that Congress can in the conduct of foreign affairs curtail the right of American citizens to support a policy contrary to the Administration's, it posits a rationale inconsistent with the First Amendment. The First Amendment precludes Congressional suppression of dissent from the Administration's foreign policy, whether on foreign or American soil. (See discussion in District Court opinion, *infra* p. 16a; Justice

[21] The *Perez* suggestion of "problems of protection" of American citizens abroad (356 U. S. at p. 57) likewise seems unreal as applied to a citizen lawfully voting in a foreign country. But in any event, administrative practice with respect to protection abroad is not a significant consideration as to citizenship and expatriation, since such protection is discretionary. *Mandoli* v. *Acheson*, 344 U. S. 133, 137, note 8.

Douglas' dissent in *Perez*, 356 U. S. at pp. 81-82; compare *Kent* v. *Dulles*, 357 U. S. 116, 130; *Aptheker* v. *Secretary of State*, 378 U. S. 500, 517.)

C. Since section 401(e) was not in its genesis or effect related to the conduct of foreign affairs, but instead reflected a punitive and retributive purpose, the reasoning of *Trop* v. *Dulles*, 356 U. S. 86, and *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144 (especially pp. 180-184), should be applied to invalidate it.

III—Restriction of Perez Holding

This Court should grant this petition to consider whether, in the event *Perez* is not overruled, it should be limited in a manner making it inapplicable to petitioner, as suggested by the concurring judge in the Court below (*infra* p. 8a).

CONCLUSION

It is respectfully submitted that this petition should be granted.

Respectfully submitted,

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